IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARIA FLORES,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
THE HOME DEPOT, INC. and	**:**	
DON LAMBERT, individually and in his	**:**	
professional capacity as Store Manager	**:**	
at THE HOME DEPOT, INC.,	**:**	
Defendants.	**:**	**No. 01-6908**

MEMORANDUM AND ORDER

Schiller, J. **April , 2003**

Presently before the Court is Defendant Home Depot's Motion for Summary Judgment on Plaintiff Maria Flores's claims under the Pennsylvania Human Relations Act, 43 P.S. § 950 *et seq*. ("PHRA"), and Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq* ("Title VII"). Therein, Defendant contends that Plaintiff's PHRA claim is time-barred and that her Title VII claims fail as a matter of law. Because Plaintiff failed to file her administrative charge within the time period required by Pennsylvania statute, and cannot avail herself of any judicially-created exception to the statutory requirement, I grant Defendant's motion as to the PHRA claim. Because Plaintiff has set forth facts sufficient to create a material issue for trial on her Title VII discrimination claim, I deny Defendant's motion as to that claim.

I. FACTUAL BACKGROUND

In February, 1999, Defendant Home Depot hired Plaintiff Maria Flores, who is Hispanic, as a "front end cashier" at its store located on Roosevelt Boulevard in Philadelphia, Pennsylvania. In

June, 1999, Ms. Flores became pregnant. In the fall of 1999, she requested an accommodation for her pregnancy-related physical limitations. (Flores Dep. at 54-55.) The cashier position, according to the Home Depot Job Profile, requires bending, stooping and lifting items weighing up to forty pounds, wearing certain safety equipment, as well as standing for up to six hours without a break. (Pl.'s Ex. A.[1], Home Depot "Job Profile,") Ms. Flores produced three separate notes from her doctor indicating that her ability to perform these requirements was restricted. (Parkview Ob/Gyn Disability Notes, Pl.'s Ex. B.) Seeking a less physically demanding work assignment, she approached Store Manager Ben Komadina and asked to be transferred to the Phone Center. (Komadina Dep. at 50.) Mr. Komadina replied that there were no openings in the Phone Center and that Ms. Flores would need to apply for a transfer through the formal transfer or "JPP" system. (*Id*.)[2]

Instead, in mid-October, 1999, Home Depot relocated Ms. Flores to the Tool Corral area as a cashier. Assistant Store Manager Michael Topping, who authorized the transfer, testified that the duties of the Tool Corral cashier were the same as those of a regular cashier, including lifting items of up to forty pounds (Topping Dep. at 47-48), but that the position typically involved handling lighter products (*Id*. at 30; Velez Dep. at 59). Ms. Flores found that the new position was just as demanding as the previous one and included duties that went beyond her doctor's restrictions, including bending and lifting. (Flores Dep. at 67, 73.) Ms. Flores approached Michael Maddox, who oversaw the Phone Center, to indicate her interest in a position there. (Maddox Dep. at 22-23.) Mr. Maddox told Ms. Flores he would make a recommendation to upper management on her behalf

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1. "Pl.'s Ex." refers to exhibits attached to Plaintiff's Response to the Motion for Summary Judgment.

2. Ms. Flores had received information, including verbal instruction, a video session and a handbook discussing the JPP system. (Flores Dep. at 29-33, 37-38.)

and later suggested to Mr. Topping that Ms. Flores be placed in the Phone Center. (Maddox Dep. at 46.) In early November, 1999, Ms. Flores also asked her immediate supervisor, Margie Velez, if she could be transferred to the Phone Center. (Velez Dep. at 23-24.) Ms. Velez told her that she needed to talk to upper management. (Velez Dep. at 25.)

Because Mr. Topping was unavailable (Flores Dep. at 54.), Ms. Flores again went to Mr. Komadina and requested a position in the Phone Center (Komadina Dep. at 52). Mr. Komadina testified that he told Ms. Flores, "I am not really sure I understand what else we could do for you at this point because we do not have an opening. And if we did have an opening, I couldn't even guarantee an interview for you." (*Id*.) Mr. Komadina told Ms. Flores that he did not know what her qualifications were, and that he was not sure she had the right "attitude" for the Phone Center. (*Id*.) Ms. Flores testified that Mr. Komadina said, "I don't know who hired you. I wouldn't hire you." (Flores Dep. at 55.) Mr. Komadina told Ms. Flores to keep looking in the JPP system for job openings. (*Id*.) Ms. Flores never submitted a formal application to transfer through the JPP system. (Flores Dep. at 74.)

Calling the validity of Mr. Komadina's statements into question, Mr. Maddox testified that Home Depot was "always looking for help" in the Phone Center. (Maddox Dep. at 17.) Customer Service Manager Angel Aponte testified that there generally "was seating available" in the Phone Center. (Aponte Dep. at 66.) Additionally, several examples of testimony indicate that because the cashier positions and the Phone Center were a part of "Operations," no formal transfer or use of the JPP system should have been required to move among those positions. (Velez Dep. at 55-56; Topping Dep. at 44-45; Komadina Dep. at 60.)

At some point just prior Ms. Flores's conversation with Ms. Velez, a pregnant white cashier,

Tiffany Schmanek, had begun to work in the Phone Center. (Maddox Dep. at 16, 24; Aponte Dep. at 66.) Mr. Topping recalled that Ms. Schmanek had produced a note from her doctor indicating pregnancy-related restrictions and that Home Depot "had to do an accomodation due to her pregnancy." (Topping Dep. at 42.) Ms. Schmanek never made use of the JPP system and was thus never formally transferred to the phone center. (Komadina. Dep. at 60, Topping Dep. at 42.) Mr. Komandina testified that Ms. Schmanek was permitted to work in the phone center as a "stopgap," working "never more than a week at one time." (Komadina Dep. at 57.)

Ms. Flores became concerned that she was being treated differently than Ms. Schmanek. (Rodriguez Dep. at 31.) Mr. Maddox, whose "initial reaction was that [Ms. Flores] was [being] discriminated against," in that she was being treated differently than Ms. Schmanek (*Id*. at 30), encouraged Ms. Flores to speak with management about this issue (Maddox Dep. at 25).

Mr. Komadina testified that it was not common practice to place employees with pregnancy-related restrictions in the Phone Center. (Komandina Dep. at 58.) Again in contrast, Mr. Maddox testified that there were "some people" who had been moved to the credit card center when they had become pregnant, and that "the two people who were put in the phone center" had been pregnant. (Maddox Dep. at 33-34.) Mr. Aponte testified that putting pregnant employees in the Phone Center was "what [Home Depot] used to do all the time." (Aponte Dep. at 66.) Ms. Velez and Ms. Shadle testified that both the Phone Center and the Tool Corral were among the "light duty" positions available to pregnant employees. (Velez Dep. at 52; Shadle Dep. at 21.) Significantly, Mr. Maddox testified that both women who were permitted to work in the Phone Center under his watch were white. (Maddox Dep. at 34.)

On November 18, 1999, Ms. Flores gave Ms. Velez, her supervisor, notice of her intent to

resign two weeks later. (Velez Dep. at 27.) Ms. Velez reported this information to Mr. Komadina one half-hour later. (*Id*. at 29.) Mr. Komadina instructed Assistant Store Manager Don Lambert to immediately terminate Ms. Flores's employment. (Komadina Dep. at 45.) Mr. Komadina and Mr. Lambert held a meeting with Ms. Flores where they told her it was company policy to immediately terminate employees who handle money when they give notice of resignation. (Flores Dep. at 78.) Ms. Flores was then escorted out of the store. (Aponte Dep. at 50.)

Various evidence suggests this handling of a notice of resignation was at odds with standard company practice. At their depositions, none of the Home Depot employees could recall a single instance in which an employee who handled cash was terminated. Mr. Lambert, in particular, was uncertain whether Mr. Komadina's instruction comported with company procedure. (Aponte Dep. at 25.) Ms. Velez remembered two cashiers, Selena Pasquarello and Jessica Joseph, who were permitted to work beyond the date on which they tendered their resignation. (Velez Dep.at 30-34; Fields Dep. at 30.) Mr. Maddox also stated that he knew of an employee, Jessica Sosinavage, who handled cash and had been permitted to remain on the job after giving two-weeks notice. (Maddox Dep. at 18-20.) Ms. Velez also testified that she had never seen an individual who handled money terminated immediately upon tendering their resignation and was not aware of any policy requiring such an immediate termination. (Velez Dep. at 36-38.) Home Depot has admitted that this "policy" was not memorialized in writing. (Def.'s Resp. to Req. for Admis. #5.)

On June 21, 2000, Ms. Flores filed a charge of discrimination with the Philadelphia Commission on Human Relations, thereby also filing with the Equal Employment Opportunity Commission. In the instant action, Ms. Flores alleges that Home Depot discriminated against her based on her race in violation of Title VII and the PHRA. She argues that Home Depot permitted

a white pregnant cashier to work in the Phone Center shortly after it denied her request to work there. She also alleges that three white cashiers tendered their resignations around the same time that she did and all were permitted to continue employment until they voluntarily decided to leave.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). The moving party bears the burden of showing that the record reveals no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson*, 477 U.S. at 247. Once the moving party has met its burden, the non-moving party must go beyond the pleadings to set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. "Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989).

III. DISCUSSION

A. Timeliness of PHRA Claim

The relevant portion of the PHRA, 43 P.S. §959(h), allows a plaintiff 180 days to file a charge of discrimination. Thus, "since a plaintiff's claim of employment discrimination may only be based on conduct that occurred within the limitations period, . . . the filing of the administrative complaint isolates the conduct upon which the claim rests." *Frederick v. Reed*, Civ. A. No. 92-0592, 1994 U.S. Dist. LEXIS 1809, 1994 WL 57213, at *3 (E.D. Pa. Feb. 18, 1994). Here, Plaintiff admits to filing her administrative charge on June 21, 2000, some 216 days after her last day of employment with Home Depot. Plaintiff maintains, however, that she may nevertheless pursue her PHRA claim by invoking the continuing violation exception or the equitable tolling doctrine. I will address these contentions in turn.

1. Continuing Violations

Plaintiff maintains that, despite her late filing, she can pursue her PHRA claim against Home Depot under the continuing violation theory. That theory, developed in reference to claims filed under Title VII and since extended to claims brought under the PHRA, allows a plaintiff to pursue a claim for discriminatory conduct that began prior to the filing period provided that she can demonstrate that the act is "part of an ongoing practice or pattern of discrimination of the defendant." *West v. Phila. Elec. Co.*, 45 F.3d 744, 754 (3d Cir. 1995) (citations omitted). To establish a continuing violation under *West*, the plaintiff must first demonstrate that at least one act of harassment or discrimination occurred within the 180 day filing period. *See id.* Second, the plaintiff must show that "the harassment is 'more than the occurrence of isolated or sporadic acts of intentional discrimination.'" *Id*. at 755 (*quoting Jewett v. Int'l Tel. & Tel. Corp*., 653 F.2d 89, 91 (3d Cir. 1981)).

Here, plaintiff contends, Home Depot "continued its discriminatory practices until at the very least, July 19, 2000." (Pl.'s Resp. at 26-27.) To support this contention, Plaintiff notes that she alleged a "continuing action" on the administrative charge form. Plaintiff points to several examples of alleged discrimination that may have occurred during the filing period. First, some time after Plaintiff's termination, Home Depot moved a pregnant white cashier named Amy to the Phone Center. Second, eight months after Plaintiff's termination, Jessica Sosinavage, a white female cashier allegedly tendered her resignation and was permitted to continue to work until she voluntarily decided to leave. Similarly, white cashiers Selena Pasquarello and Jessica Joseph tendered their resignations prior to Flores and were likewise permitted to continue to work until they voluntarily decided to leave. Home Depot also moved a second pregnant white cashier, Tiffany Schmanek, to the Phone Center shortly after Ms. Flores' request for accommodation was denied.

Even if the facts are viewed in a light most favorable to Plaintiff, they do not establish the existence of continuing violations sufficient to avoid the PHRA's 180 day filing requirement. While Home Depot may have consistently accommodated pregnant white cashiers and given white cashiers time to leave the job site after tendering their resignations, there is no evidence in the record to suggest comparatively poor treatment of non-white employees occurring during the filing period. Moreover, these two instances following Ms. Flores's termination in which Home Depot permitted white cashiers to remain on the job did not have even an indirect adverse impact on Ms. Flores. If, for example, she had been vying for a job that went to one of these individuals after her termination, it would be more appropriate to regard these as instances of discrimination.

Finally, Judge Robreno recently determined that acts occurring after termination cannot constitute instances of discrimination for purposes of establishing continuing violations. *See Velez*

v. QVC, Inc., 227 F.Supp.2d 384, 398 (E.D. Pa. 2002). In *Velez*, Judge Robreno wrote, "'[w]hen an employee is terminated, the employment relationship ends; and the fear of reprisal and the reasons for allowing employees to claim a continuing discriminatory policy are removed.'" *Id.* (*citing Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1222 n.12 (11th Cir.2001)). Without adopting that rule, I find that the reasoning set forth in *Velez* provides an additional basis for refusing to treat the favorable treatment of two white employees as an "act" of discrimination for continuing violations purposes.

I am therefore unable to find that act of discrimination occurred within the filing period that would support Plaintiff's continuing violations claim. Plaintiff thus cannot successfully invoke the continuing violations theory to avoid the statutory bar to her PHRA claims.

2. Equitable Tolling

At oral argument, Plaintiff urged the Court to permit equitable tolling of the 180 day filing requirement. Section 12(e) of the PHRA provides that the 180-day period in which to file an administrative charge may be extended through equitable tolling. 43 PA. STAT. ANN. § 962(e); *Brennan v. National Telephone Directory Corp.*, 850 F. Supp. 331, 341 (E.D. Pa. 1994). However, "restrictions on equitable tolling . . . must be scrupulously observed." *Williams v. Army and Air Force Exch. Serv.*, 830 F.2d 27, 30 (3d Cir. 1987) (*quoting Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 19 (3d Cir. 1981)) (alteration in original). There are three "principal, although not exclusive" situations in which equitable tolling may arise. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994). These include situations in which either (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly

in the wrong forum." *Kocian v. Getty Ref. & Mktg. Co.*, 707 F.2d 748, 753 (3d Cir. 1983).

Here, Plaintiff contends that her pregnancy constituted an extraordinary bar to her filing a PHRA claim. At oral argument, her counsel represented that Ms. Flores gave birth just before the lapsing of the filing period and suffered medical complications. Ms. Flores's deposition testimony indicates that she gave birth on March 1, 2000, some two and-a-half months prior to the lapsing of the 180 day period. (Flores Dep. at 14.)

While pregnancy, particularly where complications occur, can present the sort of obstacle to the filing of a PHRA claim that must be considered in evaluating the equity of a statutory time bar to plaintiff's claim. However, Plaintiff has proffered no evidence beyond the mere fact of her pregnancy to create a factual dispute as to whether she was prevented from filing her PHRA claim in "some extraordinary way." Furthermore, although she did not know all the facts that she has cited in support of her claim at the time of her termination, Ms. Flores was aware of several key facts at the core of her claim. *See Hart v. J.T. Baker Chem. Co.*, 598 F. 2d. 829, 834 (3d. Cir. 1979.); *see also Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 305-08 (3d. Cir. 1983) (holding that equitable tolling proper where defendants deceived plaintiff into postponing filing of claim and plaintiff did not have sufficient information to make out discrimination claim until well after he learned of termination). It is clear from the record that Plaintiff knew prior to her termination that she had been treated differently than a white, pregnant coworker with respect to pregnancy accommodation. (Flores Dep. at 91.) There is also evidence that at least one white cashier who gave advance notice of her resignation was permitted to remain on the job prior to Ms. Flores's termination. (Velez Dep.

at 31.) Accordingly, Ms. Flores cannot equitably toll the PHRA filing deadline.[3]

B. Title VII Claim

Ms. Flores claims that she has suffered individual disparate treatment based on her race or national origin in violation of Title VII. Under the familiar *McDonald-Douglas* analysis, a plaintiff claiming disparate treatment pursuant to Title VII who lacks direct evidence of discrimination must initially establish a prima facie case. To establish such a case, the plaintiff must show that (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) a similarly-situated person, who is not in her protected class, was treated more favorably. *See McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Goosby v. Johnson & Johnson Med., Inc*., 228 F.3d 313, 318 (3d Cir. 2000). "Once the plaintiff establishes his or her prima facie case, the burden shifts to the defendant to articulate one or more legitimate, non-discriminatory reasons for its employment decision." *Waldron v. SL Indus., Inc*., 56 F.3d 491, 494 (3d Cir. 1995) (*quoting Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

If the defendant meets its burden, the plaintiff, in order to survive a motion for summary judgment, generally must point to evidence that: (1) casts sufficient doubt upon each of the

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3. This finding does not affect Plaintiff's Title VII claim. Plaintiff is allotted 300 days from the date of the alleged discrimination within which to file a charge of employment discrimination with the EEOC, even where her filing with the state agency is untimely. *See Oshiver*, 38 F.3d at 1385 (citing *Davis v. Calgon Corp*., 627 F.2d 674, 675 (3d Cir. 1980). *See also Mohasco Corp. v. Silver*, 447 U.S. 807, 815 (1980) ("a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved if the State happens to complete its consideration of the charge prior to the end of the 300-day period."); *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1414 (3d Cir.1991) (holding in ADEA case that plaintiff in Pennsylvania entitled to extended 300 day period regardless of whether plaintiff files state claim).

legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or (2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. *Fuentes v. Perskie*, 32 F.3d 759, 762 (3d Cir. 1994).

Defendant appears to divide Plaintiff's Title VII case into two separate "claims," one relating to the alleged failure to transfer and the other to the alleged discriminatory termination. As such, Defendant's summary judgment motion challenges Plaintiff's ability to make out a prima facie case on the first "claim" and Plaintiff's ability to show pretext on the second. While Plaintiff's response seems to adopt Defendant's approach to this case, I cannot. Plaintiff's complaint contains a single Title VII Count, which incorporates by reference all of the allegations relating to both alleged instances of discrimination. Plaintiff's case can only be characterized as one of individual disparate treatment based on multiple examples of indirect evidence that Plaintiff was treated less favorably than similarly-situated white employees. Moreover, the alleged incidents occurred in close temporal proximity, and involved the same decision maker, Store Manager Komadina.

1. Plaintiff's Prima Facie Case of Discrimination

Defendant admits that Ms. Flores is Hispanic and thus is a member of a protected class. My analysis therefore focuses on the second and third elements of Plaintiff's prima facie case.

a. Adverse Employment Action

Plaintiff contends that she suffered an adverse employment action when Home Depot twice denied her request to transfer to the Phone Center, required her to work in the Tool Corral, and permitted Ms. Schmanek to work in the Phone Center. An adverse employment action sufficient to support a prima facie case is one that "alters the employee's compensation, terms, conditions or

privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997). The Third Circuit has not squarely addressed whether a denial of transfer may be classified as an adverse employment action. However, the Third Circuit has held that receiving or being denied a desired promotion is sufficiently serious and tangible to constitute a change in the employee's "terms, conditions, or privileges" of employment. *Robinson*, 120 F.3d 1286, 1300.

While Plaintiff cannot show that she was denied a promotion, she can show that she was denied a "privilege" of employment when she was treated differently than other pregnant employees. Plaintiff has set forth facts sufficient to make out an issue for trial as to whether Home Depot had a common practice of permitting pregnant employees to occupy positions in the Phone Center and credit card center. Through this common practice, Home Depot implicitly demonstrated the job-related value to pregnant employees of occupying a position in the Phone Center and, in effect, rendered access to Phone Center and credit card center positions a privilege available to pregnant employees. Denying Ms. Flores such a position and transferring her to a position that Home Depot management knew did not meet her doctor's restrictions, when record facts suggest such a position was available and was regularly given to similarly situated employees, therefore must be regarded as – like a denial of promotion – an adverse change in Plaintiff's employment privileges.

Defendant contends that there were no available positions in the Phone Center and that Plaintiff never "applied" for a position in the Phone Center, because she did not make use of the JPP system. These arguments are misguided. First, record testimony establishes that were their openings in the Phone Center, and that the employee who oversaw the Center recommended Ms. Flores for a position there. Second, record evidence undermines the value to Home Depot of the fact that Ms.

Flores never formally applied through the JPP system when (1) two supervisors told her that talking to upper level management was the proper approach and (2) it permitted an identically situated employee, Ms. Schmanek, to work in the phone center without using the JPP system. There is additional record testimony that indicates that an JPP application may not, in fact, have been necessary to accomplish a transfer from the cashier position to the Phone Center. Plaintiff has thus set forth facts sufficient to create a factual dispute as to whether she suffered an adverse employment action through Home Depot's failure to promote her.

Defendant also marshalls caselaw indicating that a purely lateral transfer, or denial thereof, will generally not be regarded as an adverse employment action. *See, e.g., Burger v. Cent. Apartment Mgmt*., 168 F.3d 875, 879 (5th Cir. 1999); *Craven v. Tex. Dep't of Criminal Justice-Inst. Div*., 151 F. Supp. 2d 757, 766 (N.D. Tex. 2001); *Boykins v. Lucent Tech., Inc*. 78 F. Supp. 2d 402, 415 (E.D. Pa. 2000.); *Brown v. Brody*, 199 F.3d 446, 455-56 (D.D.C. 1999); *Cahill v. O'Donnell*, 75 F. Supp. 2d 264, 274 (S.D.N.Y. 1999). Here, the Phone Center position carried the same salary, benefits, schedule, grade and other terms and conditions of employment as a Cashier position. Yet the Third Circuit has repeatedly held that a transfer or reassignment into a position that an employee cannot do or that renders an employee worse off in terms of working conditions or economic opportunity may constitute an adverse employment action. *See Goosby* 228 F.3d at 319 (holding that genuine issues of material fact existed as to whether employee suffered adverse employment action when, following restructuring, employer assigned her to sell medical products to nursing homes rather than to the hospitals with which she was familiar); *Jones v. Sch. Dist. of Phila.*,198 F.3d 403, 412 (3d Cir. 1999) (holding that teacher suffered adverse employment action when he was twice transferred to new schools, where he lost opportunity to teach physics as result of first transfer, and was required

as result of second transfer to teach in school that had reputation of being difficult); *DiIenno v. Goodwill Indus. of Mid-Eastern Pa.*, 162 F.3d 235, 236 (3d Cir. 1998) (holding that transfer to job that employer knows employee cannot do may constitute adverse employment action). In *DiIenno*, the court noted, "it is important to take a plaintiff's job-related attributes into account when determining whether a lateral transfer was an adverse employment action. An inability to do a particular job is job-related, unlike a desire to live in a certain city." 162 F.3d at 236. (*citing Serrano-Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23, 26 (1st Cir.1997) (setting employee up to fail can be adverse action)).

The facts here do not present a case of purely lateral transfer. Plaintiff has put forth manifold evidence that Home Depot denied her a position that it regularly made available to others in her situation. Although Plaintiff's transfer to the Phone Center would not have generated greater income or benefits, it would have put her in a position where she could perform her work in accordance with the reasonable requirements laid out by her doctor, of which Home Depot was aware. In this context, Plaintiff has suffered more than "minor and trivial employment actions," such as name calling, *Robinson*, 120 F.3d at 1300, or general dissatisfaction with her job. *Sherrod v. Phila. Gas Works*, 209 F.Supp 2d 443, 450-51 (E.D. Pa. 2002). Home Depot caused access to the Phone and credit card center to become a privilege of employment for pregnant employees. Home Depot then denied Ms. Flores that privilege and instead transferred her to a position whose requirements violated doctor's restrictions of which it was aware.

Secondly, under these facts, Ms. Flores can create a genuine issue for trial as to whether she

was constructively discharged.[4] Discrimination results in constructive discharge if "the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887-888 (3d Cir. 1984). Here, Home Depot's initial refusal to allow Ms. Flores to work in the Phone Center and its transfer of her to the Tool Corral meant that she suffered under uncomfortable working conditions that she knew went outside her doctor's requirements. Ms. Flores testified that when she was denied a Phone Center position a second time she was told, "I wouldn't hire you" by the senior decision-maker at Home Depot and was also told that she had to remain in the Tool Corral position or look for work outside of Home Depot. She then learned in short order that a pregnant white cashier was permitted to work in the phone center. I consider the objective reasonableness of Plaintiff's position in light of the fact that the record suggests that Home Depot regularly permitted other pregnant employees to occupy positions in the Phone Center and credit card center.

In *Goss,* the court upheld a district court's finding of constructive discharge where a female sales representative was verbally abused about her decision to become pregnant, her employer assigned her lucrative sales territory to a male representative despite the plaintiff's successful performance, thus effectively cutting her pay, and her attempts to pursue remedies in-house resulted

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4. The Third Circuit has not definitively resolved the issue of whether a constructive discharge necessarily qualifies as an adverse employment action, but has suggested that it might. *See Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153 (3d Cir. 1999) (rejecting a theory under which any substantial adverse action would not be tangible adverse action if it led affected employee to quit before demotion took effect as "contrary to Title VII doctrine," which "recognizes a constructive discharge under such circumstances"). In *Cardenas v. Massey*, 269 F.3d 251, 266 n.10 (3d Cir. 2001) the court reserved this question for resolution in the first instance by a district court but assumed that a constructive discharge could operate as a tangible employment action.

in the ultimatum that she either accept the new assignment or resign. 747 F.2d at 888. Here, Ms. Flores was disparaged about her qualities as a worker, was denied a position in the phone center that her employer subsequently granted to a white employee despite record evidence that the position was available and that Ms. Flores had presented evidence that her medical condition would warrant the transfer, and her repeated attempts to facilitate a transfer resulted in a similar ultimatum.

Defendant argues that Ms. Flores cannot show she was constructively discharged because she failed to take advantage of various alternatives to resigning such as a) approaching her direct supervisor, b) getting another doctor's note, c) applying through the JPP system or d) seeking early maternity leave. Ms. Flores already had already approached individuals in positions of authority on four separate occasions to ask them to facilitate a transfer. In two of those cases, she was told that consulting upper management was the right approach. She also knew that another cashier had been permitted to work in the phone center. In the one instance where Mr. Komadina told her to make use of the JPP system, he also told her that she would likely not get the job and made disparaging remarks about her. Ms. Flores by this point had already produced three doctors notes, the last of which clearly showed that the front end cashier duties – which were materially replicated in the Tool Corral – went beyond her restrictions. Ms. Flores could thus not have been reasonably expected to pursue the alternatives described by Home Depot, apart from taking the unreasonable step of pursuing early maternity leave. I conclude that Plaintiff has put forth facts sufficient to create a genuine issue for trial as to whether she was constructively discharged and thus suffered an adverse employment action at the hands of Home Depot.

b. Comparatively Favorable Treatment of Similarly Situated Person

Home Depot's argument that Ms. Flores cannot show that Ms. Schmanek was treated more

favorably because Ms. Schmanek was not "transferred" is equally unavailing. First, Ms. Flores and Ms. Schmanek were "similar in all of the relevant aspects;" both were cashiers who became pregnant and sought light duty positions based on doctors' recommendations. *Ercegovich v. Goodyear Tire and Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). The record evidence strongly suggests that the requirement of using formal transfer system, which functioned as a barrier in Ms. Flores's case, was either waived in Ms. Schmanek's case or not a requirement at all. Several employees, including the individual who oversaw the Phone Center, testified that Ms. Schmanek worked in the Phone Center. Thus, the fact that Ms. Schmanek was not "transferred" through the formal system is irrelevant. Plaintiff has also put forth evidence to create a genuine issue for trial as to whether it was common practice to permit white pregnant employees to work in the phone center. Mr. Maddox's testimony indicates that of the two pregnant women permitted to work in the phone center while he oversaw it, both were white. I find, therefore, that Plaintiff has put forth evidence sufficient to make out an prima facie case based solely on Home Depot's failure to permit her to work in the Phone Center. Therefore, I need not address whether Home Depot's termination of Ms. Flores constitutes an adverse employment action.

2. Home Depot's Non-Discriminatory Reasons for Its Actions

Because Ms. Flores has set forth facts sufficient to make out a prima facie case of discrimination, the burden shifts to Home Depot to produce evidence that it had a legitimate, non-discriminatory reason for the challenged adverse employment action. *Burdine*, 450 U.S. at 254-256. Home Depot does not explicitly advance a non-discriminatory reason for its failure to permit Ms. Flores to work in the Phone Center. Based on the facts in the record, therefore, I must assume that Home Depot's reason for refusing to permit Ms. Flores to work in the Phone Center was that there

were no available positions in the Phone Center and that Plaintiff never "applied" for a position in the Phone Center, because she did not make use of the JPP system. Defendant need not persuade the Court that it was actually motivated by the proffered reasons and need merely raise a genuine issue of fact as to whether it discriminated against the plaintiff. *Burdine*, 450 U.S at 254. Additionally, my analysis of Defendant's proffered reason "can involve no credibility assessment." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Mr. Komadina's testimony, though heavily disputed, supports the existence of these non-discriminatory reasons for Home Depot's refusal to permit Ms. Flores to work in the Phone Center such that Home Depot can meet its production burden.

Home Depot, cannot, however, successfully argue that Plaintiff has created no genuine issue for trial on the ultimate issue of whether it intentionally discriminated against Ms. Flores. *Burdine*, 450 U.S. 253. In *Fuentes*, the Third Circuit held that to survive a motion for summary judgment when the defendant offers a legitimate reason for its employment action,

> the plaintiff who has made out a prima facie case may defeat a motion for summary judgment by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

32 F.3d at 764. Here, Plaintiff has more than amply discredited Home Depot's proffered reasons. As discussed above, Ms. Flores can point to evidence creating a genuine issue for trial as to whether positions were available in the Phone Center when she applied, and whether her failure to use the JPP system could legitimately have prevented Home Depot from permitting her to work there.

Home Depot has also taken the position that it had a legitimate reason for terminating Ms.

Flores immediately in the form of its policy of terminating employees who handle cash. Setting aside the issue of whether Plaintiff's termination alone could support a prima facie case since Plaintiff has already met its burden through facts relating to the failure to transfer, Plaintiff still could discredit Defendant's proffered reason for its early termination of Ms. Flores. Defendant explains that it had a "practice regarding cash-handling employees." (Def.'s Mem. of Law at 26.) Plaintiff can directly discredit this reason. The record is replete with evidence that cash-handling employees who tendered their resignations were not immediately terminated and were, in some cases, permitted to work for some time. I thus conclude that Plaintiff has set forth facts sufficient to create a genuine issue for trial as to whether Home Depot discriminated against her.

IV. CONCLUSION

For the foregoing reasons, I will grant Defendant's motion for Summary Judgment in part and deny it in part. First, Plaintiff filed her PHRA claim after the expiration of the statutory filing period and has not put forth evidence sufficient to create a material dispute as to whether she should be permitted to avail herself of either the continuing violations or equitable tolling theories. Accordingly, Plaintiff's PHRA claim is time-barred and I must grant summary judgment for Defendants as to Plaintiff's PHRA claim. Second, Plaintiff has put forth evidence sufficient to create a prima facie case of discrimination and Defendant has failed to meet its burden of production by providing a non-discriminatory reason for its actions. As such, I cannot enter summary judgment for Defendant on the Title VII claim. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARIA FLORES,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
THE HOME DEPOT, INC. and	**:**	
DON LAMBERT, individually and in his	**:**	
professional capacity as Store Manager	**:**	
at THE HOME DEPOT, INC.,	**:**	
Defendants.	**:**	**No. 01-6908**

AND NOW, this day of **April, 2003**, upon consideration of Defendant's Motion for Summary Judgment and the response thereto, and for the foregoing reasons, it is hereby

ORDERED that:

Defendant's Motion for Summary Judgment (Document No. 11) is **GRANTED IN PART** and **DENIED IN PART** as follows:

a. Summary judgment is granted as to Plaintiff's PHRA claim.

b. Summary judgment is denied as to Plaintiff's Title VII claim.

BY THE COURT:

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Berle M. Schiller, J.